

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77

1301

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Number

UNITED STATES OF AMERICA,

-v.-

HARVEY JOHN POLL,

Use short title

Defendant-Appellant

NOTICE OF MOTION

state type of motion

for Extension of Time to Submit
Brief On Appeal.

United States Attorney

Southern District, N. Y.

ROBERT B. FISKE, Jr.

MOTION BY:

(Name and telephone number of attorney in charge)

OPPOSING COUNSEL:

(Name and telephone number of attorney in charge)

ALAN F. NAFTALIS, Joint Strike Force

Has opposing counsel consented? ☐ Yes ☐ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Date of argument of appeal, if scheduled:

EMERGENCY MOTIONS, MOTIONS FOR STAYS

& INJUNCTIONS PENDING APPEAL

Has request for relief been made below?

(See F.R.A.P. Rule 8.)

☐ Yes ☒ No

Would expedited appeal eliminate need for this motion?

☐ Yes ☒ No

If no, explain why not: n/a Not fully submitted

Judge or agency whose order is being appealed: The Honorable Charles H. Tenney, United States District Court Judge for the Southern District of New York. Order attached.

Brief statement of the relief requested: I respectfully request an additional extension of time in which to submit brief. Separate motion for leave to dispense with an appendix has been served and submitted on even date with this motion.

Previous requests for similar relief and disposition: Previous motion for an extension of time was granted and time has expired.

BRIEF

B
P/S

Statement of the issue(s) presented by this motion: Whether or not my appeal should be dismissed for failure to submit papers in a timely manner as ordered by the Court, when such failure is partly due to my being Ordered by the Honorable Jacob Mishler, Judge, Eastern District of New York, to remain in court during an entire criminal trial of the attorney that tricked me into taking a plea of guilty to a felony, which by this appeal, I hope to vacate. The days in court and the strain thereof, drained me.

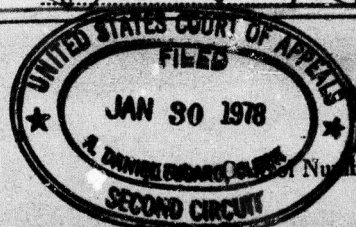
Brief statement of the facts (with page references to the moving papers): On April 21st, 1975, I pled guilty to an Information (Document # 2.) in return for which the Government promised to dismiss the Indictment... And, I was led to believe, be left alone by the Government, expressly understood to mean, no further harassment of my family and no further interest in my knowledge, if any, of the crimes charged in the underlying indictment. Without prior notice, in the midst of serving my sentence and hoping to earn a parole and furlough, I was brought before a Strike Force Grand Jury and asked to give testimony on the very same subject matter that I elected to endure a conviction and suffer prison for rather than discuss. I refused to testify, and the Government moved

Summary of the argument (with page references to the moving papers): to punish me for contempt. A lengthy hearing was had before the Honorable Charles L. Brieant, and he denied the Government's motion in all respects, and filed a Memorandum, "44780" containing specific findings: (Order and Memorandum attached hereto) That I never would have pleaded guilty; that the Government was misleading and unfair. Judge Tenney, adopting the Government's position wholly, denied my motion to vacate the conviction (Document # 13.). Rosenberg, testifying in the contempt matter, admitted that I had a factual defense. It turns-out that he knew I would probably be called as a witness against him in several then pending criminal investigations. I never knew this when I paid him to represent me—that he had self-serving reasons to see me in jail and diminish my credibility. (I do not have the minutes of the Rosenberg trial held before Judge Mishler, but I heard it all.) The Government admittedly tricked me, and counsel set me up.

ARGUMENT: A conviction is never academic. How can such a conviction stand?

For completion by the Clerk of Court

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* RECORDS ROOM *
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
 :
 -against- : 77 Civ. 1301
HARVEY JOHNPOLL, : AFFIDAVIT IN SUPPORT
 : OF MOTION FOR AN EX-
 Defendant-Appellant. : TENSION OF TIME TO
 : SUBMIT BRIEF ON APPEAL
-----X
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

HARVEY JOHNPOLL, being duly sworn, deposes and says:

1. That I am the defendant-appellant herein, appearing pro se.
2. That this affidavit, respectfully submitted, is in support of the within motion to allow me an additional period of time to prepare, serve and submit my brief on appeal.
3. That the moving papers consist of a Notice of Motion, this Affidavit, and certain documents that are part of the record on appeal, indexed and referenced, and attached hereto as an informational aid, and all of the proceedings heretofore had herein.
4. That a prior motion for the same relief was granted; the time in which to submit has lapsed and my appeal could be dismissed for failure to comply with the Order of this Court.
5. That a dismissal of the appeal would cause irreparable damage to me, while the granting of a further extension could not possibly prejudice the Government, the appellee herein.
6. That my failure to submit in a timely manner is due to unusual circumstances and emotional strain, rather than as a dilatory tactic. This motion is not made for delay.

7. That the base issue presented by this appeal is justiciable in character, not at all frivolous, important to the methodology of the criminal justice system, and deserving of appellate consideration.

8. That I was indicated on August 26, 1974, charged with one count for possession of \$2,000,000 of counterfeit obligations, and the other count, for sale of same. (74 Cr. 808). Upon my arrest, August 8, 1974, I retained the firm of Zane and Zane to represent me. Most of my pretrial motions were denied, including the motion to be co-counsel, and as my attorney never tried a federal criminal matter before Judge Tenney relieved him and ordered that I find new counsel forthwith.

I knew Teddy Rosenberg for several years; we were socially active together, and we were partners on a real estate transaction that terminated about December 1970. My wife and I paid him "last money" to try this matter for me. My friends and family met with him on many occasions, preparing him for trial. On the day the trial was to begin, he beseeched me to take a plea: he said if I lost I would be remanded; that I would get a very stiff sentence; that the only witnesses were the three Secret Service agents, one of which was the undercover agent, the exact same Francis McDonnell who seems to be my co-conspirator in the Information that I later pled to; the other two agents being distant observers. Rosenberg said that even though I had a factual defense, as well as some good legal questions, my exposure was too great. I admit, the threat of fifteen years or more, was somewhat terrifying.

10. My family and friends prevailed upon me, and in front of everyone, I told Rosenberg that I would only take the plea upon the express proviso that my plea of guilty would end the Government's interest in me; no more subpoenas; no grand juries; no agents that want to talk to me .. the plead would "end it".

11. Rosenberg agreed, went to speak to the prosecutor, reported that my conditions were agreed upon, and I mindlessly pled to a one-count Information, 75 Cr. 406.

12. That three months after I was sentenced, I was writed back to the Southern District of New York, brought before a grand jury, and asked the very same questions I chose to go to jail rather than discuss. I refused to comply.

13. A hearing was had on the Government's motion to punish me for contempt and I was given what amounted to another 18 month sentence. However, Judge MacMahon vacated that Order and a new hearing was had before the Honorable Charles L. Brieant, Jr.

14. That after a very lengthy hearing, Judge Brieant made specific finings, and also denied the Government's motion. Said decision is filed under # 44780, and attached hereto.

15. Judge Brieant's findings are the predicate for my motion to vacate and an appropriate motion was made and denied by and before Judge Tenney, and this appeal was duly taken. The motion is attached hereto.

16. I did every day of my sentence, and was irreparably damaged by being a writ prisoner for over fifteen months at the MCC, New York; never a furlough, parole denied, and everyone wondering what the heck I was doing there so long.

17. Finally I was released to a half-way house, and I was subpoenaed before a grand jury that was investigating Teddy Rosenberg. I testified before the grand jury under the proviso that I would not be called as the Government's witness. I did not wish to so testify.

18. Judge Mishler ordered me to attend the entire trial. The trial occurred during the time I was to submit the brief. I was drained. I learned from that trial that Rosenberg had every reason to expect that I might someday be called as a witness against him. He knew, but I did not, that he was under several agency investigations, including the criminal tax investigation he was recently convicted of. Prior to representing me he testified before the bar association that he had given me the entire proceeds of a certain business transaction. This later became the key element in certain criminal and civil cases. I decided to hold off on my matter before this court until Rosenberg was sentenced.

19. I never would have pled guilty. I never knew what was in that envelope. I was not involved, nor would I have been involved in counterfeits. I said this from day one. I was the target of intensive investigations prior to this matter, and Teddy convinced me that although I had a very good background, and should get a soft sentence, that because it was a Strike Force case, and that I have refused to cooperate with them for over four years, I would get very close to the maximum.

20. The Government, and Judge Tenney agrees, say that only if I lost the contempt case would my conviction be vacated. That I am in the same position I was in when I took the plea.

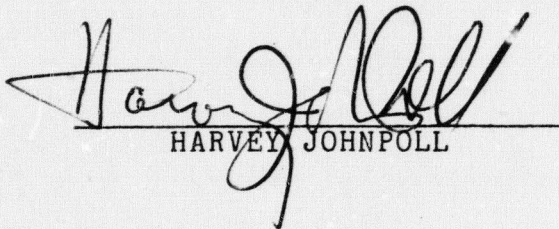
21. The issue I am trying to present to this Court is that I would not have taken the plea.

22. The prosecutor testified at my contempt hearing that the Government intended from the very beginning to get me before the grand jury.

23. I say that the plea was not only involuntary but that the conflict of interest by defense counsel, together with the unfairness of the Government's is so contaminating as to make the conviction unreliable.

24. The prejudice of a conviction always matters.

25. If the motion is granted, I will submit my brief on time.


HARVEY JOHN POLL

Sworn to before me this
10th day of January, 1978.



MARY V. PAPANDREA
Notary Public, State of New York
No. 43-4606490
Qualified in Richmond County
Commission Expires March 30, 1979

Exhibit

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

HARVEY JOHNPOLL,

Defendant.

:
: NOTICE OF MOTION

: 74 Cr. 808

: 75 Cr. 406 and

: Derivative matters

: (C.H.T.)
:-----X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavit of Harvey Johnpoll, the annexed Letter for Equitable Relief, the annexed Memorandum of Law, and all the proceedings heretofore had herein, the defendant Harvey Johnpoll will move this Court, at a date and time convenient to the Court, for an Order, pursuant to 28 U.S.C., Section 2255 and/or Rule 57(b), Federal Rules of Criminal Procedure, and/or pursuant to 28 U.S.C. Section 1651(a) and (b):

(i) vacating the judgment of conviction previously entered against him; and dismissing the Information;

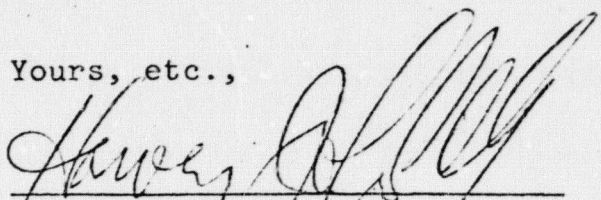
(ii) for a Declaratory Judgment that the Indictment previously dismissed be declared as being dismissed with prejudice to renew or;

(iii) in the alternative, for a reduction of sentence imposed upon the plea previously entered to the information to time already served and for such other and further relief as to the Court may

deem just and proper.

Dated: New York, New York
November 12, 1976

Yours, etc.,


HARVEY JOHN POLL, pro se
150 Park Row 11 North
New York, New York 10007
Reg. # 00152/158

TO:

ROBERT B. FISKE, JR.
United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

:

-against-

:

HARVEY JOHNPOLL,

:

AFFIDAVIT

74 Cr. 808

75 Cr. 406

(C.H.T.)

Defendant.

-----X

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

HARVEY JOHNPOLL, being duly sworn, deposes and says:

1. I am the defendant in the within matter, pro se, and I make this Affidavit in support of my motion, pursuant to appropriate statutes and rules cited in the NOTICE OF MOTION, to vacate the judgment of conviction, etc.

2. On April 21st, 1975, I pleaded guilty to an Information charging me with conspiracy in connection with the possession and distribution of a sum of United States Treasury bills, in violation of 18 U.S.C. 371. Ultimately, on December 1, 1975, I was sentenced to a term of three years imprisonment.

3. My plea to this Information was the result of a plea bargain between my then attorney, Theodore Rosenberg, Esq., and the prosecutor then in charge of my case, William Del Grosso. As part of the bargain, I pleaded guilty to a superseding Information in exchange

for the Government's dismissal of pending indictment and to see an end to several years of harrassment.

4. Rosenberg, in the presence of my friends and family, was instructed that I could only take a plea if there was a prior understanding that I, my family, my friends, would not be further questioned about the crime. Rosenberg, a few minutes before the plea was taken, was seen speaking to Del Grosso, and immediately thereafter declaring, that my plea to an information would "End it." Rosenberg later made a sworn deposition and eventually testified to the fact that he "Must have done it". See transcript of Contempt hearing, annexed hereto as Exhibit "B".

5. Rosenberg, then under indictment (and still) for serious felonies, and under intensive investigation by Nadjari and others, practiced only crimianl law for the 25 years he has been practicing. (for a wider view please see letter for Equitable Relief).

6. I was supoenaed by a Nadjari Grand Jury, shortly after my plea was entered into to testify about some of Rosenberg's criminal enterprise and criminal activity, if any. Subsequently, Rosenberg asked the Court to be relieved, and the Court granted Rosenberg's motion, recognizing a glaring conflict of interest.

7. The essence of Johnpoll's claim is that his plea was involuntarily entered because the circumstances surrounding his plea negotiations, when objectively viewed, led him to the reasonable, albeit erroneous, belief that the plea would dispose of the case in its entirety

and would thus exempt JOHNPOLL from any effort on the part of the Government to compel him by way of grand jury subpoena to disclose his source for the counterfeit treasury bills or any other information regarding his involvement in printing and distribution of counterfeit bills, if any.

Thus, JOHNPOLL was under a critical misapprehension of the consequences of his plea. The plea violated every section of Rule 11 of the Federal Rules of Criminal Procedure.

8. Indeed, at the very time the plea was entered, the Government intended, and in fact subsequently attempted, to compel me to disclose the source of the bills before a grand jury. When I refused to give any testimony whatever, after having been granted "use immunity", under 18 U.S.C. § 6002, the Government sought a contempt citation.

9. In proceeding before the Honorable Charles Brieant, Jr., however, the Court ultimately declined to impose any punishment for contempt. Judge Brieant made an express finding of fact that, although the plea bargain which disposed of my case did not include an agreement not to call him as a witness, the fact remained that he could well have reasonably concluded that it did.*

* A copy of Judge Brieant's opinion is annexed hereto as Exhibit "A".

10. It is critical to note that the Court's findings in this regard were based upon the application of objective standards to the fact and circumstances surrounding the plea negotiations and the entry of plea, rather than a subjective analysis of my state of mind. Indeed, the Court even declined to hear my testimony. Rather, the Court found that the prosecutor's failure to make known his intention, extant at or about the time of the entry of my plea, to call the defendant as a witness before a grand jury, was a critically misleading omission, and contributed significantly to an atmosphere in which anyone in my, or my attorney's position could well have concluded that the plea bargain included the promise that the Government would not seek Johnpoll's testimony in later proceedings. The Court made the following specific findings:

Although I decline to find that Rosenberg, at his client's request specifically spoke to Del Grosso about whether Johnpoll would be brought before the grand jury, or that he received any assurances that such would not take place, I do find that the entire atmosphere of the pre-negotiations was such as to lead a responsible person in Rosenberg's or Johnpoll's position to believe that if he took it, (the plea) this will end it. As noted, although Rosenberg did not ask about possible subsequent grand jury inquiry, Del Grosso didn't tell him. Del Grosso was not engaged in any intentional wrong doing or unprofessional conduct, but his failure to speak was a misleading omission and unfair.

*

*

*

Rosenberg was correct in assuming that

given a reasonable good probation report and cooperation in giving up the true source of the forged bills, Johnpoll would have received a much more lenient sentence. That the government intended, following the disposition, to call Johnpoll before the grand jury was not known to Rosenberg or Johnpoll; they reasonably believed by taking the plea they would end Johnpoll's troubles, he would serve his time, and at the expiration of his sentence go free, without being harassed further, or required to give up the source of the bills.

Id; at 6-7

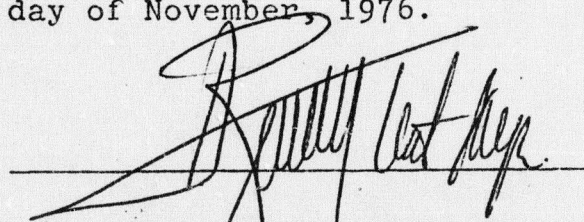
11. Based upon these findings of fact, it clearly follows that my original plea of guilty was not voluntary, and hence not validly entered. Accordingly, my conviction must be vacated and I must be permitted to be free from further prosecution.

WHEREFORE, your deponent prays that the relief sought herein be granted.


HARVEY JOHNPOLE

Sworn to before me this 12th

day of November, 1976.



AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4064)

METROPOLITAN CORRECTIONAL CENTER
150 PARK ROW
NEW YORK, NEW YORK 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-against-

HARVEY JOHN POLL,

Defendant.

:

:

:

:

74 Cr. 808

75 Cr. 406

AFFIDAVIT OF SERVICE

-----X
STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

HARVEY JOHN POLL, being duly sworn, deposes and says:

That on the ³12th day of ^{Feb}November, 19⁷⁷6, your affiant served the within Notice of Motion, Affidavit, letter to the Court and Memorandum of Law upon U.S. Attorney ROBERT B. FISKE, at One St. Andrews Plaza, New York, New York, the address designated by said attorney for that purpose by depositing a true copy of same to said attorney enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 12th

day of November, 1976.

Harvey John Poll

"AUTHORIZED BY THE ACT OF JULY 1, 1956
TO ADMINISTER OATHS (18 U.S.C. 4004)"

[Signature]
METROPOLITAN CORRECTIONAL CENTER
150 PARK ROW
NEW YORK, NEW YORK 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
In the Matter of a Witness :

HARVEY JOHNPOLL, :

before the grand jury. :

M 11-188

MEMORANDUM AND ORDER

4/17/80

-----X
Ericant, J.

On August 12, 1975, under docket No. 75 Cr. 406-CHT, Harvey Johnpoll, also known as John Poll, was convicted on his plea of guilty to a superseding Information charging him with having conspired with intent to defraud, to pass and sell, possess and conceal, counterfeited obligations of the United States, to wit, approximately \$2,000,000.00 in United States Treasury Bills, in claimed violation of 18 U.S.C. §371. At that time, Johnpoll was sentenced pursuant to §4208(b), of Title 18 United States Code to a study, report and recommendation of the Attorney General. Thereafter upon receipt of the recommendation, Judge Tenney of this Court resentenced Johnpoll, and on December 1, 1975 the judgment was modified to a term of three years, with immediate parole eligibility, pursuant to 18 U.S.C. §4208(a)(2). NO -

Johnpoll commenced serving his sentence, and is presently incarcerated at the federal prison, Danbury, Connecticut.

A writ Ad Testificandum was issued returnable April 14, 1976, and Johnpoll was brought before the October 16, 1975 Special Grand Jury in this District as a witness for its inquiry into alleged violations of 18 U.S.C. §§472, 2314 and 371. On May 7, 1976 he was granted "use immunity" under §6002 of Title 18 United States Code, in connection with that appearance.

Thereafter, Johnpoll refused to testify. While his refusal was complete, and extended even to giving his name and answering whether or not he was married (both matters already fully known to the prosecutors), the real purpose of his appearance before the Grand Jury was to find out the source of manufacture of the counterfeit Treasury Bills, a matter which he steadfastly refuses to disclose under oath.

Thereafter, Johnpoll was brought before Judge MacMahon in Part I of this Court, and ordered summarily confined at Danbury, until such time as he is willing to testify before said Grand Jury, or until the expiration of the term of said Grand Jury (April 15, 1977, subject to an 18 month extension), whichever shall first occur, but said confinement in no event to exceed 18 months.^{1/}

Thereafter, for reasons not relevant here, Judge MacMahon, by order dated May 26, 1976, vacated his May 19, 1976 order, and scheduled a new hearing in Part I of this Court, before me on May 28, 1976.

An evidentiary hearing has been held. The Court is indebted to assigned counsel Arthur Viviani, Esq. for his assistance in making clear at this hearing the facts surrounding Johnpoll's conduct not previously disclosed to Judge MacMahon, which, taken together, are somewhat unusual and appear to give rise to equities in Johnpoll's favor.

Johnpoll's only contention worthy of consideration is that there was a plea bargain, pursuant to which he entered his plea of guilty, and that by reason of the plea bargain, he is exempted from further harassment arising out of the unlawful possession of the counterfeit bills, including being brought before the Grand Jury. The facts, as I find them to be, mentioned below, do not give rise to a legal excuse in Johnpoll's favor, or relieve him in law from the duty imposed on everyone to give testimony. But on the whole record, equities do exist in his favor which render it inappropriate to confine him for contempt in failing to do so.

Johnpoll had been arrested on August 8, 1974 in possession since July 30th of that year, of twenty forged Treasury Bills in \$100,000.00 face denominations, each payable October 3, 1974. By indictment filed August 14, 1974 (74 Cr. 808-CHT) he was charged in two counts, with violation of 18 U.S.C. §473 (Count I) and §472. After the usual pre-trial skirmishing, a date was set in the Spring of 1975 for trial before Judge Tenney of this Court and a jury.

The testimony of Theodore Rosenberg, Esq., a respected and experienced criminal practitioner, and Johnpoll's attorney at and shortly prior to the time of his plea, supports the findings of fact stated below.

Rosenberg came into the case substituting for a prior attorney, at least two or three weeks prior to April 21, 1975. He began immediate preparation to defend the charges in indictment 74 Cr. 808.

William Del Grosso was the prosecutor then in charge of Johnpoll's case. He was known professionally to Rosenberg, who in connection with preparing the case for trial and seeking to ameliorate the criminal responsibility of his client, had several conversations with Del Grosso in and around the courthouse, and visited his office on two occasions.

Count I of that indictment carried a maximum sentence of ten years, and the penalty under Count II could have been fifteen years.

Rosenberg concluded early that the factual elements of the case could not be defended successfully, although there was in his view a legal question (regarded as frivolous by Judge Tenney and ourselves) as to whether a Treasury Bill is within the meaning of "obligation or other security of the United States," contained in 18 U.S.C. §§472, 473, because not listed by name in 18 U.S.C. §8.

Rosenberg, who had been socially friendly with the defendant before his arrest, reached the conclusion that a disposition to a lesser charge would be in the interests of justice. It was in this context that a superseding information charging the same facts under a different statute, having a five year maximum sentence was agreed to in order to minimize Johnpoll's exposure to lengthy imprisonment.

At the time the superseding information was filed and consented to by Johnpoll, and on the date that he pleaded guilty, the prosecutor had in mind that after the case was closed, and regardless of outcome, he would call Johnpoll before the Grand Jury to

testify as to the source of the forged bills.

In pre-trial proceedings, Johnpoll had asserted that his supplier was one Maurice Rind, a Government informer. This is a common dodge in such cases. The prosecutor assiduously avoided saying anything of his future intentions to Rosenberg or the defendant, and under all of the surrounding circumstances, had such a disclosure been made, it is highly likely that defendant and his attorney would have rejected the plea bargain. Instead, Rosenberg was talking in the broad general terms usually employed in such dealings. He said, and intended, the plea was to "clear up the [entire] case."

Entirely innocent as well as not guilty

Although I decline to find that Rosenberg, at his client's request specifically spoke to Del Grosso about whether Johnpoll would be brought before the Grand Jury, or that he received any assurances that such would not take place, I do find that the entire atmosphere of the plea negotiations was such as to lead a reasonable person in Rosenberg's or Johnpoll's position to believe that "if he took it, [the plea] this will end it." (Tr. p. 27). As noted, although Rosenberg did not ask about possible subsequent grand jury inquiry, Del Grosso didn't tell him. Del Grosso was not engaged in

any intentional wrongdoing or unprofessional conduct, but his failure to speak was a misleading omission and unfair.

Rosenberg's reasoning was interesting and accurate. He testified (Tr. pp.27-28):

"MR. ROSENBERG: ... otherwise knowing me I wouldn't have taken the plea. If I knew that the man is going to be exposed for five years, and then subsequently be brought back where he can have additional exposure --

THE COURT: What's the additional exposure?

MR. ROSENBERG: The one that he is having right now, by going before a grand jury and not wanting to testify with respect to that. Because if he wanted to cooperate originally, your Honor, he probably could have gotten a walk. But he being involved he took the position that he took."

Rosenberg was correct in assuming that given a reasonably good probation report and cooperation in giving up the true source of the forged bills, Johnpoll would have received a much more lenient sentence. That the Government intended, following the disposition, to call Johnpoll before the Grand Jury was not known to Rosenberg or Johnpoll; they reasonably believed by taking the plea they would end Johnpoll's troubles, he would serve his time, and at the expiration

of his sentence go free, without being harassed further, or required to give up the source of the bills.

It was obviously clear to Johnpoll and Rosenberg that giving up the source of the bills would have been highly beneficial to Johnpoll in his dealings with the Government. That he did not do so may be attributed to some form of stubbornness or loyalty, or more likely to the fact, well known to this Court, that credibly forged United States Treasury Bills of these denominations and number certainly were not printed by Johnpoll. Most likely they had their origin with Organized Crime, or were printed overseas as the effort of some powerful international criminal syndicate. Detection of such a source would have been so important to society that any prosecutor would have embraced Johnpoll as a cooperating witness and sought leniency for him, or perhaps even an order nolle prosequi. By the same token, although he does not say so, such a disclosure could have imperiled Johnpoll's life. Under all the circumstances Johnpoll made a reasoned decision to make the best accommodation he could, do his time, and remain uncooperative insofar as his fellow criminals were concerned.

It was at least clear that his agreement to waive indictment and plead to the superseding information was based on a promise

that the prior indictment, which promised a longer sentence if convicted, would be dismissed. We do not regard a statement on the record by Johnpoll at the time of his plea to the effect that no promises or inducements were causing him to waive indictment in connection with the superseding information, as being entitled to any weight. Rosenberg testified that, in reliance on the good faith of the prosecutor, he did not believe it was necessary to make a record of his understanding of the terms of the plea bargain.

In our efforts to do equity in such matters, we need not impose the statute of frauds on the ramifications of deals made by criminals in connection with disposition of charges against them, and attach no significance to the fact that Rosenberg's reasonable expectations that the plea would terminate the matter for his client were not set forth on the record.

With that state of mind only, Johnpoll's position here would be entirely untenable, but the equities in his favor are improved by the fact that Del Grosso testified that he had the subjective intention all the time to bring Johnpoll before the Grand Jury as soon as his case was closed by plea or verdict, and never told him so. It would have been fair, reasonable and proper to

have said so, and doubtless, threatened with such further harassment Johnpoll would have gone to trial on the original indictment, and forced additional burdens on the judicial system associated with a lengthy trial and inevitable appeal.

Johnpoll made an offer of proof at the hearing before me to the effect that he believes that he had a contract or a plea bargain, the effect of which was to terminate all of his difficulties and keep him from any further harassment by the authorities, provided he served his penal sentence. The Court finds that he could have held such belief reasonably, and further that it was reasonably induced by all of the circumstances, taken in their context, with particular emphasis on the failure of the prosecutor to speak at the time of the plea bargain. The test, however, is whether a reasonable person so situated would have such a belief, and his subjective reaction or opinion is of no relevance. For that reason, I declined to take his testimony. *NO - I did not testify*

On balancing the equities, the Court believes that the Government conduct in this matter was inappropriate. A prosecutor must be actuated by fairness and openness, even when bargaining for a plea with the lowliest criminal, Santobello v. New York, 404

U.S. 257, 261 (1971).

Even when it acts in its investigatory capacity, the Grand Jury is an arm of this Court. Notwithstanding the valiant performance of this body in defense of our liberties for more than eight centuries, the Grand Jury as an institution is under severe attack at this time. This reflects a perception by persons who have had contact with the Grand Jury in its investigatory capacity, that some reform is in order.

Recently, a number of reform bills have been introduced in the Congress, and are presently pending. These include H.R. 1277, introduced by Hon. Joshua Eilberg of Pennsylvania, which, as part of a comprehensive plan for change, reduces the maximum period of confinement of a recalcitrant witness for contempt from eighteen to six months; abolishes reiterative contempt and prohibits any subsequent confinement of recalcitrant witnesses refusing to testify in the same transaction. This bill also requires the Court to inform the Grand Jury of its powers, specifically, to inquire into federal offenses, and conduct independent inquiry of witnesses and documents, all as has been the custom and practice in this District for many years. See specimen Grand Jury Charge used by the Hon. Irving R. Kaufman, Chief Judge of this Circuit, 17 F.R.D. 331, 335, 336 (1955).^{2/}

Regardless of what avenue reform in this area may take, ultimately the discretion and judgment concerning what is to be done with a recalcitrant witness will remain, as it now is, with the district court.

Title 28 of the United States Code, §1826 declares the inherent power of a common law court in relevant part as follows:

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refused without just cause shown to comply with an order of the court to testify ... the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."
[Emphasis added]

The statute does not, nor could it, compel the Court to confine such a recalcitrant witness. The issue is addressed to the Court's discretion and judgment, not to the wishes of a prosecutor. Perhaps as common law judges, we will best preserve our cherished

institutions by exercising the power of coercive civil contempt against recalcitrant grand jury witnesses sparingly and with compassion, not against all contemnors. Rather, we should imprison only where on all the surrounding facts such vast power must be applied to vindicate society's rights and aid the proper functioning of the grand inquest in cases where it is essential to do so.

In this case, perhaps we should hesitate to substitute our judgment for that of the prosecutor and the grand jurors in determining how important it is, now, in the Summer of 1976, to find out who originated forged Treasury Bills in July 1974. Johnpoll could have been subpoenaed almost a year ago, were it so important. We would think that by this time, unless the engravers and printers have lost their skills, retired, given up or died, other forged Treasury Bills, (which have a maturity no longer than one year), would have been presented for redemption, showing on their falsified faces the same authorship as Johnpoll's bills. Notwithstanding our reluctance to go into this issue, existence of a genuine present necessity to obtain the testimony sought to be compelled is one of the factors which the Court may balance in deciding whether to imprison a recalcitrant witness.

Johnpoll is not being asked to disclose some matter of extreme pressing public urgency, such as the location of a stolen atomic bomb, or the motive for the Watergate burglary. Rather, he is being asked for a palpably stale fact, the source of counterfeits obtained by him more than two years ago. Balanced against the apparently relative unimportance of the information sought, are the equities in his favor flowing from the negotiations leading to his plea bargain.

In the exercise of discretion, and because of the factors aforementioned, the Court declines to apply the power of coercive civil contempt to Johnpoll in this case. The Government's motion is in all respects denied.

So Ordered.

Dated: New York, New York
July 16, 1976

CHARLES L. BRIEANT

CHARLES L. BRIEANT
U. S. D. J.

F O O T N O T E S

1. The Court by order dated May 19, 1976 specifically provided that such confinement shall "interrupt the three year federal sentence currently being served by Harvey Johnpoll ...which sentence shall not resume until the confinement directed by this order is terminated."
2. Other grand jury reform bills introduced, and under consideration by a subcommittee of the House Committee on the Judiciary, would similarly limit the period of confinement, would abolish reiterative contempt, and would require the Court to instruct the grand jury as to its powers. See, e.g., H.R. 2986 (21 sponsors), H.R. 6006 (Reps. Kastenmeier and Railsback); H.R. 6207 (Reps. Rangel and Eckhardt); H.R. 11660 (Rep. Conyers); H.R. 14116 (Rep. Holtzman). H.R. 6207 would permit successive confinement for contempt subject, however, to a six month limitation of the total time of confinement. H.R. 6207 also would require the Government to notify the grand jury of its intent to seek the indictment of a particular individual and advise the grand jury of its right to subpoena that individual. H.R. 11660, in addition to abolishing use immunity, would require the witness' consent before immunity can be granted.

In addition, Congressman Eilberg has also submitted a proposed joint resolution presently pending with the Committee on the Judiciary, H.J. Res. 46, calling for an amendment to the United States Constitution, abolishing the need for an indictment, but continuing the investigative function of a grand jury.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

-v- :

HARVEY JOHN POLL, a/k/a John Poll :

Defendant. :

-----X

INFORMATION

75 Cr 406

The United States Attorney charges:

1. From on or about July 30, 1974, to on or about August 8, 1974, in the Southern District of New York and elsewhere, the defendant Harvey Johnpoll, a/k/a John Poll, and other persons unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, that is violations of Title 18, United States Code, Sections 472 and 473.

2. It was part of said conspiracy that said defendant and his co-conspirators unlawfully, wilfully and knowingly, with intent to defraud, would pass and sell, and attempt to pass and sell, and would keep in their possession and conceal falsely made, forged, counterfeited and altered obligations and other securities of the United States, to wit, approximately \$2,000,000.00 in United States Treasury Bills, \$100,000.00 denomination, bearing Serial Numbers 741137B, 741173B, 741731B, 743711B, 747113B, 747131B, 734711B, 311774B, 374711B, each and every Bill bearing an Issue Date of April 4, 1974, and a Due and Payable Date of October 3, 1974.

3. It was further part of said conspiracy that said defendant and his co-conspirators unlawfully, wilfully and knowingly would sell and deliver false, forged, counterfeited and altered obligations and other securities of the United States, to wit, as described in paragraph 2 of this information, with the intent that the same be passed, published and used as true and genuine.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendant and his co-conspirators committed and caused to be committed the following overt acts, among others in the Southern District of New York and elsewhere:

1. On or about July 30, 1974, the defendant Harvey Johnpoll, a/k/a John Poll, met Francis McDonnell in the Shelton Health Club, Brooklyn, New York.

2. On or about August 8, 1974, the defendant Harvey Johnpoll, a/k/a John Poll physically possessed twenty (20) counterfeit United States Treasury Bills, \$100,000.00 denomination, at the Plaza Hotel, New York, New York.

(Title 18, United States Code, Section 371)

PAUL J. CURRAN
United States Attorney

Dated:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

TRAVERSE TO GOVERNMENT'S
OPPOSITION

-v- :

AFFIDAVIT

HARVEY JOHN POLL, :

Defendant. :

74 Cr. 808 Indictment
75 Cr. 406 Information

-----X
(C. H. T.)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HARVEY JOHN POLL, BEING DULY SWORN, DEPOSES AND SAYS:

1. I am the defendant herein, pro se, and I have moved this Court pursuant to the appropriate provisions of law to have the above-captioned information dismissed, and for such other and further relief as to the Court might deem equitable.

2. That the moving papers consist of a Notice of Motion, an Affidavit, a Memorandum of Law, A letter to His Honor, Exhibits and all of the proceedings heretofore had herein. All of the foregoing papers were submitted to the Court and a true copy of same were served upon the United States Attorney for the Southern District of New York.

3. That on December 13th, 1976, I received a copy of the Government's Opposition, which consists of an undated Affidavit by one Alan R. Naftalis, Special Attorney, United States Department of Justice.

4. That this instant Affidavit is my Traverse to the Government's position herein, and is hereby respectfully submitted.

5. That the only matter derivative of my plea to the above information that was before the Honorable Charles L. Brieant was the Government's motion to punish me for civil contempt, and the subsequent Memorandum and Order, dated July 16th, 1976, was confined to the parameters of that matter.

6. The issue before this Court is whether or not I would have accepted any plea disposition that would have left me open to further litigation. One of Judge Brieant's specific findings is the grit of my instant motion:

With that state of mind only, Johnpoll's position here would be entirely untenable, but the equities in his favor are improved by the fact that Del Grosso testified that he had the subjective intention all the time to bring Johnpoll before the grand jury as soon as his case was closed by plea or verdict, and never told him so. It would have been fair, reasonable and proper to have said so,

and doubtless, threatened with such further harrassment Johnpoll would have gone to trial on the original indictment and forced additional burdens on the judicial system associated with a lengthy trial and inevitable appeal. [Emphasis supplied.]

7. The Government seems to take no issue, and, in fact, no issue can be taken, that, objectively viewed, I was duped into taking the plea, and the plea, therefore, was not intelligently and voluntarily made.

8. As a consequence to taking the plea many rights and privileges were waived or surrendered, including but not limited to the right to a trial-by-jury, and I am enduring other dire consequences as a result of accepting the offer to plead guilty. Rosenberg testified before Judge Brieant that he urged that I take the plea because [then] my exposure would be limited; that the plea would end my troubles in the Southern District; that I would not be remanded; That Del Grosso showed him the list of the Government witnesses and it consisted entirely of Secret Service Agents: The undercover agent, and two other back up agents, and that there were no tapes, wiretaps or radio transmissions. I am trying to get a copy of the transcript of both Rosenberg's and Del Grosso's testimony before Judge Brieant, but my best recollection is that Rosenberg testified that he thought I had a factual defense, but that my exposure was too great and that a plea of guilty by me would end for all time several years of harrassment of me.

9. Significantly, nowhere in the fourteen page "memorandum" is there a scintilla of a finding that the plea bargain in my case meets the standard of integrity -or any other acceptable standard for a legally sufficient plea bargain. (Please see my Memorandum of Law for case authority on this point.) The contrary is true, for as Judge Brieant found: The Government's willful failure to speak concerning its' intention to subpoena me before a grand jury on the same matter that I was about to plead guilty to "...was a misleading omission and unfair". Certainly this instant motion is not "frivolous", but the proper method to show the Court how seriously prejudiced I am as a result of being duped into taking a plea. (Please see letter to His Honor, dated November 12th, 1976, which letter is part of the moving papers herein.)

10. The Government now contends that I have not been prejudiced as their ploy was defeated by the Court, and insists, that as their tactic did not hurt, I have no recourse. My attempt at trickery cost my family and myself three years of sheer grief, and this is an understatement. I never knew that the envelope I passed to the undercover Secret Service agent contained counterfeits: our negotiation never suggested counterfeit. However, my culpability is not in issue here, and it is unfair of the Government to deal with my instant motion in so specious a manner as the Government's Opposition implies: A response unwarranted by my pleadings now before the Court.

11. My moving papers set forth factually and with particularity the many ways that I was seriously prejudiced and still prejudiced as a result of the Government's unfair and misleading omission at the time I took the plea. The intensity of the prejudice is immeasurable, beyond the terrible fear of facing a grand jury; having a contempt trial that took nearly five months; the threat of an additional eighteen months of consecutive imprisonment. I will reiterate some of the direct prejudice, and I pray that the Government will be candid enough to consent that the legal value of the prejudice, if any, is entirely within the purview of this Court.

12. The front page of my pre-parole progress report, dated August 23rd, 1976, is attached hereto and made a part hereof. Please note how the report reflected that I am guilty of contempt, but have not been punished for it. I appeared before the Parole Commission that morning and was "Continued to Expiration".

13. Further grief and prejudice as follows:

a. I am in jail over sixteen months, and because I am a "Danbury case", I am ineligible for a furlough. I was not even permitted to visit my wife and son at their hospital beds after they survived and were recuperating from serious surgery. I probably will not even be approved for a half-way house either, because I am a man without an institution.

b. I took the plea on April 21st, 1975, and the Government said that the indictment would be dismissed as part of the promise of the plea bargain. The Government refused to dismiss the indictment until December 1st, 1975, and imposed another condition in return for which the indictment would finally be dismissed: That I consent to the withdrawal of my appeal, then pending.

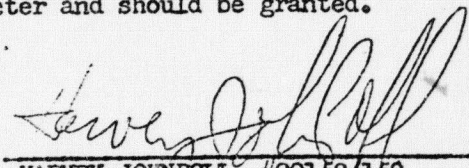
c. The indicia of responsibility of merely being taken before grand juries on a Writ of Habeas Corpus Ad Testificandum puts me in a delicate and dangerous position. As a result of taking a plea, I am not only harrassed as much as I ever was, but now the peril and the consequences are greater. The Government must consider that I am literally broke, and very much hassled, and vulnerable, and in an impossible position to defend against anything.

d. The hard and good work that I performed while at Lewisburg, then Danbury, then here at MCC, then back at Danbury, and now here again, goes unrewarded, because it seems that I am never at the right institution at the right time for posting to my account the money that I worked for. How can the Government now assert, so blandly, that I am restored to the same position of expectation that I had on April 21st, 1975?

e. My teeth are falling out; my jaw is numb all day long. My stomach has turned hostile to even a glass of water. The Bureau of Prisons answered my plea for dental attention by saying that I am designated to Danbury, and when I return, I can seek treatment there. I am sixteen months in jail on a sentence that expires in twenty six months, and have spent only four-and-one-half months in Danbury.

f. I am a pro se litigant, yet I am permitted only three (3) less than one hour visits per week, confined to nominating only six visitors.

14. WHEREFORE, it is respectfully submitted that the motion of HARVEY JOHN POLL is justiciable in character and should be granted.


HARVEY JOHN POLL #00152/158
Metropolitan Correctional Center
150 Park Row 11 North
New York, New York 10007

Sworn to me this 16
day of December, 1976



"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)"

To:

Alan R. Naftalis, Esq.
Department of Justice
Joint Strike Force
1 St. Andrews Plaza
3rd Floor
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,	:	
-against-	:	74 Cr. 808
	:	75 Cr. 406
HARVEY JOHNPOLL,	:	
Defendant.	:	

-----X

MEMORANDUM OF LAW

Submitted By

HARVEY JOHNPOLL 00152
Pro Se
150 Park Row
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 :
 -against- : 74 Cr. 808
 : 75 Cr. 406
 HARVEY JOHN POLL, : (C.H.T.)
 :
 Defendant. :
-----X

MEMORANDUM OF LAW

ARGUMENT

THE DEFENDANT'S MOTION SHOULD BE RULED
UPON IN TERMS OF THE EQUITIES INVOLVED.

A plea of guilty induced by coercion, threats, or unfulfillable, illusory promises, is invalid because it strips the plea of its voluntary character. See, e.g., Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927). Similarly, a plea of guilty induced in any significant way by the defendant's objectively reasonable, albeit erroneous belief that the promises made to him were broader or more inclusive than in fact they were is involuntary and void. United States ex rel. Thurmond v. Mancusi, 275 F.Supp. 508, 515 (E.D.N.Y. 1967).*

* The "subjective" analysis employed in Thurmond to determine voluntariness has since been abandoned. This is discussed in greater detail, infra.

Here, the defendant pleaded guilty under circumstances where any reasonable person) could have concluded that his bargain with the government included) the representation that the defendant would not, following his plea and incarceration, be hauled before a grand jury and, under a grant of immunity, be compelled to disclose the names of other individuals involved with him in his illegal activities or any other facts related to his case. Judge Brieant expressly so found in proceedings brought on before him by the government for the purpose of punishing JOHNPOLL for contempt when he refused to testify before a grand jury. It is important to point out in this connection, that Judge Brieant very carefully considered the evidence before him from an objective rather than subjective point of view. He found that although the government did not deliberately mislead the defendant or his counsel into believing that JOHNPOLL would not be compelled to divulge information when in fact the government intended to call him as a grand jury witness from the outset, the prosecutor's "failure to speak was a misleading omission and unfair." Making clear that its determination was based upon a wholly objective view of all of the facts and circumstances surrounding the plea negotiations, the Court wrote the following:

"Johnpoll made an offer of proof at the hearing to the effect that he believes he had a contract or a plea bargain, the effect of which was to terminate all of his difficulties and keep him from any further harassment by the authorities, provided he served his penal sentence. The Court finds that he could have held

such belief reasonably, and that it was reasonably induced by all of the circumstances, taken in the context, with particular emphasis on the failure of the prosecutor to speak at the time of the plea bargain. The test, however, is whether a reasonable person situated would have such a belief, and his subjective reaction or opinion is of no relevance. For that reason, I declined to take his testimony."

The Court's carefully considered opinion that the objective facts and circumstances could have lead a reasonable person in JOHN POLL's situation to conclude that the bargain he had made with the government was broader than in fact it was both reflects the correct focus of any inquiry into the voluntariness of a guilty plea and requires the vacatur of JOHN POLL's conviction.

The law is clear in this Circuit that a plea of guilty entered by a defendant who labors under a misapprehension of the scope of the agreement which induced the plea is involuntary just to the extent that the defendant's misapprehension was reasonable as an objective, rather than subjective matter of fact. United States ex rel. LaFay v. Fritz, 455 F.2d 297 (2nd Cir. 1972); United States ex rel. Curtis v. Zelker, 466 F.2d 1092 (2nd Cir. 1972). Thus, where a defendant pleads guilty under a reasonable misapprehension of the consequences of his plea or the scope of the agreement which induced it, the plea is involuntary and the defendant must be permitted to withdraw it.

In Mosher v. Lavalle, 491 F.2d 1346 (2nd Cir. 1974), a New York State prisoner sought habeas corpus relief on the ground that his plea of guilty had been induced by his lawyer's misrepresentation of the sentence which the Court would impose. After a hearing, the District Court found as a fact that the defendant had been induced to plead guilty based upon his lawyer's representation that the Court had promised a sentence of no more than fifteen or sixteen years, when in fact the Court ultimately sentenced the defendant to a term of imprisonment of from forty to sixty years. Finding that the defendant's plea was the result not of his subjective misinterpretation of the representations of his counsel but based upon the objectively reasonable conclusion that his lawyer's representations were truthful and accurate, the District Court granted the writ. The Court of Appeals affirmed.

The facts in Mosher, the Court of Appeals held, distinguished it from those situations in which a defendant pleaded guilty following a purely subjective misunderstanding of either the terms of the plea bargain or the reliability of his lawyer's estimate of the ultimate sentence to be imposed by the court. Rather, Mosher's plea was void because the circumstances, judged against objective standards, reasonably justified his misapprehension. The Court wrote:

The instant case is the rare one -- unique in this Circuit so far as we know -- where after an evidentiary hearing the District Court had made a finding based on substantial evidence that...[petitioner] had sustained his burden of proving that the circumstances

as they existed at the time of the guilty plea, judged by objective standards, reasonably justified his mistaken impression -- here a false statement by defense counsel to Mosher that a promise of a minimum sentence had been made by the judge who thereafter imposed the maximum sentence.

Mosher v. Lavalley, supra at 1348.

The present case is on all fours with Mosher. Here, as in Mosher, the defendant pleaded guilty under the reasonable expectation that the terms of his plea bargain included a promise which in fact had not been made. This misapprehension, in both instances, was objectively reasonable. In Mosher, the defendant's lawyer had affirmatively misrepresented the posture of the plea negotiations. In the present case, the government's failure to make known to the defendant or his counsel its ultimate intentions, while not intentional, nevertheless led the defendant into the belief that his bargain with the government included the promise that his plea would put an end to the case. As Mosher makes clear, under these circumstances, the defendant must be permitted to withdraw his plea. See also, United States ex rel. Selikoff v. Commissioner of Corrections, 524 F.2d 650, 653 (2nd Cir. 1975). }
The defendant here is asking for the further relief of dismissal of the information with special sanctions.

It is not entirely fair to rely upon the findings reached in a derivative but dissimilar matter as the sole legal sufficiency for both matters, particularly when the underlying matter is seriously questioned as to its legal sufficiency. The equities must be examined by this Court, and a finding made that is consistent with both fact

and law, as well as equity. Judge Brieant confined the inquiry to the Government's motion to punish the Witness [JOHNPOLL] for contempt, which was the only matter properly before the Court [Brieant].

There are several important questions of fact that only this Court has jurisdiction over, beyond the practically conceded issue that JOHNPOLL has a strong argument to withdraw his plea.... JOHNPOLL was virtually tricked into taking the plea, and JOHNPOLL's experienced attorney carefully explained that he "Must Have" gotten some understanding with the Government, and because he had prior working experience with the Government attorney, and trusted him, he felt that he did not have to put the agreement on the record. So at this point there are issues of competency of counsel as well as an involuntary and unintelligent plea. During the Contempt Hearing, the attorney for the Government admitted that there was tremendous pressure constantly applied on JOHNPOLL as well as on his friends and family, aimed at getting JOHNPOLL to cooperate on this and perhaps on other matters as well. This pressure on JOHNPOLL began long before the crime occurred, and it was always JOHNPOLL's position that the Government's role in this instant case bordered on creating a crime and then cleverly coaxing JOHNPOLL into taking a role in the Crime. JOHNPOLL testified that he took the plea because this would end all harassment, and to reduce his exposure. The Government testified that JOHNPOLL's purpose in taking the plea was defeated even before he took the plea because "We intended to bring him before the grand jury as soon as he took the plea and was sentenced." Obviously, an

anticipatory breach, and for this reason alone, the Government should not be permitted to use any further ploys or threats to defeat this action by forcing JOHNPOLL to now go to trial on charges that the Government has had dismissed.

Reasonably, the defendant here should not be confined to relief pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. Rather, it should be considered that JOHNPOLL is well within the purview and intent of Davis v. United States, 417 U.S. 333, 335 and Hill v. United States, 368 U.S. 424 (1962), in which the Court declared that a federal prisoner may petition for relief to challenge fundamental defects in his conviction that inherently result in a miscarriage of justice.

It is not arguable that the Government did not violate a bargain because no such bargain existed, because that fact has never been determined in the proper forum. JOHNPOLL believed he had a bargain; his lawyer advised him, and his friends and family, that he just spoke to the Government attorney, and that the Government will not call upon him (JOHNPOLL) in the future on any matter concerning this case.

The Government attorney vehemently denied that he made such an understanding, and he stated that no such understanding could have been had because it was always the intention of his office to get JOHNPOLL to accept a plea and then subsequently, bring him before a Grand Jury. The defendant will only concede what the Government's intentions were, but no such concession will be made as to whether

or not JOHNPOLL, his lawyer, and the Government reached an agreement. Something seems very wrong here: An experienced lawyer, negotiating a plea with a Government attorney he trusted from past experiences; the defendant and the lawyer having a social relationship over 7 years extant; an issue very important to the defendant seemingly settled, yet violated by prearrangement before the defendant was even a party to the agreement. The defendant submits that the Government was a party to the agreement, even though now the Government claims such an agreement would have been inconsistent with its purpose.

It is significant that the Government asked JOHNPOLL to withdraw his appeal then pending in return for which the underlying indictment would be dismissed. See, December 1st sentencing minutes. This dismissal should have occurred regardless, because that the agreement on the record made at the time the plea was taken, April 21, 1975.

Certainly, to permit the Government to relitigate any issue against JOHNPOLL because of this instant motion is tantamount to the grossest due process violation ever envisaged by the writers of the Constitution. JOHNPOLL has been in jail 15 months at the submission of this motion and his sentence, minus good time, expires in another 11 months. There should be no question left of JOHNPOLL's accountability. JOHNPOLL was eligible for parole by operation of law immediately after the imposition of sentence. The only item that is justicable, is JOHNPOLL's conviction. The sentence is pretty much served, the conviction lasts a lifetime, and the conviction is

of such question that it should be expunged, and not further action to reconvict JOHNPOLL should be permitted. Specific performance, to wit: that the indictment that was dismissed stay dismissed seems to be the only fair thing to do here. See, United States v. Hallam, 472 F.2d 168 (9th Cir. 1973), and Santobello v. New York, 404 U.S. 257 (1971) The prosecutor made a bargain to dismiss the indictment, and again, renegotiated the bargain at the time of sentence by asking that a certain stipulation be entered into before the Government finally agreed to dismiss the indictment. The Supreme Court in Santobello, supra, endorsed the procedure which permits the trial court to order the remedy, and made this observation: (Court).

is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement... [or withdrawal of defendant's] plea of guilty.

404 U.S. at 263.

The defendant did not plead guilty to the indictment, but rather to an information, and the underlying Indictment was dismissed. The charge set forth in the Information is substantially different from the charges in the indictment.

Defendant's affidavit together with his Letter to the Court, and made apart of the pleadings herein set forth how defendant substantially and materially prejudiced by the unlawful plea. To face a trial on the original indictment now, broke, incarcerated, his friends and family at the end of their patience and resources; his witnesses unavailable; his entire defense exposed, is such as to make a fair

trial impossible. In Mulreed v. Kropp, 425 F.2d 1095 (6th Cir. 1970), the court held that the defendant, after successfully challenging his conviction, could only be retired on the charges for which he was convicted.

The plea to the information was taken and entered on April 21, 1975. The defendant was served with a Nadjari Grand Jury subpoena in early June of 1975, the target of the investigation being Mr. Teddy Rosenberg. At a critical stage, defendant is left without an attorney, and placed under a serious strain not only to cope with the Nadjari subpoena, but to find a good lawyer who would give a lot of time and effort to the matter, and also demand very little money. James B. Zane, defendant's original attorney in this matter had to withdraw for many reasons, mostly because he felt that with the denial of the discovery and bill of particular motions, a trial based upon the defense of entrapment would be a futile gesture, and the only plea then being offered was a plea to the indictment, unless of course, defendant would make cases for the Government - which the defendant refused to do, leaving the defendant with the alternative of going to trial, and finding a trial attorney that would do him a favor-step into a case at the middle of it, and try it, or as it turned out, get a proper disposition - reducing the exposure involved, and see an end of the intensity and focus of the Government upon the defendant. The defendant retained Theodore Rosenberg, knowing that he was under an Indictment, but having no

reason to expect that he [the defendant] would ever be involved in any way with his (new) lawyer's personal criminal problems. The question here is one of when the conflict of interest occurred and how persuasive was the conflict?

A new lawyer is again brought in to represent the defendant, and instead of insisting that the indictment be dismissed as was stipulated upon the entering of the plea to the information, the new lawyer, his first federal case, on the day of defendant's modification of sentence, brings him a stipulation to agree to withdraw an appeal then pending, in return for which the Government will finally dismiss the underlying indictment. The stipulation was agreed to and made a part of the record.

The situation can be graphically summed-up if we consider the totality of the ironies involved here: The defendant declined to make cases for the Government, instead accepted jail under circumstances when objectively considered.

...would end JOHNPOLL's troubles, he would serve his time, and at the expiration of his sentence go free, without being harassed further, or required to give up the source of the bills.

Judge Brieant's decision, page 7 and 8, and has since been the object of two separate writs of habeas corpus ad testificandum, in neither of the writ's is JOHNPOLL even a potential target of the inquiry. Obviously, JOHNPOLL could not even serve his sentence in a normal fashion, attempting to earn parole, earn money, earn furloughs and perhaps involve himself in meaningful programs of lasting value

such as group-therapy, vocational training, work release and college courses. JOHNPOLL's sentence was so interrupted by these writs that out of a total of 15 months imprisonment he spent less than 5 months in Danbury. Nothing new is the object of the writs - all stale subjects.

As await prisoner at MCC JOHNPOLL is "close custody" and even a proper dental regimen is denied him because he is not designated to MCC officially. His mail is lost, delayed or otherwise withheld. His legal actions are scattered and even his parole appeal is shuffled somewhere between Danbury and MCC. A letter with a money order enclosed, postmarked 11/18/75 was delivered to him 11/1/76 and the few dollars he has (about \$15.00) is still at Danbury. JOHNPOLL's personal clothing is missing and his wife had to replace it twice so far, and even the efforts that are required to get an adequate typewriter borders on Herculean.

All of the foregoing is precisely contrary to JOHNPOLL's purpose in taking a plea, and the Government knew this at the time of the plea and long before the plea.

The Writ of Habeas Corpus has been so used against JOHNPOLL to such an extent that there seems to be a serious violation of Section 4E of the Interstate Agreement on Detainers Act, Title 18, United States Code, Appendix, as carefully set forth by the United States Court of Appeals for the Second Circuit in United States of America v. John Munro and John Fusco, Docket Nos. 76-1251, 1252, decided October 26, 1976, Mansfield, J. J., dissenting.

Unlike Munro-Fusco, supra, JOHN POLL was not a state prisoner, but similarly, JOHN POLL was writ out of a prison, twice; his sentence interrupted and he was seriously threatened and prejudiced thereby.

Article II(a) of the agreement provides:

State shall mean...the United States
of America.

There is little difference between a Writ of Habeas Corpus ad testificandum and a Writ of Habeas Corpus ad prosequendum, and at least in the latter writ the object of the writ gets before a court and has his rights and privileges properly protected, whereas in the former writ, the object only gets before a court when he is about to be punished for contempt.

There is little question that the writ of Habeas Corpus is a "detainer" and that the United States is party to the act as both a sending and receiving "state".

In sum, we conclude that the agreement in clear and unequivocal language commits the United States to all of its terms including Article IV.

Article IV(E) provides:

If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article IVE hereof, such indictment, information or complaint shall not be of any further force or effect, and, the court shall enter an order dismissing the same with prejudice.

JOHNPOLL was abused as thoroughly as any prisoner could possibly be and the only indictment, information involved herein are the above captioned.

Accordingly, the defendant here should be permitted a hearing to determine the equities, and the information must be dismissed with prejudice to the Government to in any way renew the underlying Indictment.

Respectfully submitted,

HARVEY JOHNPOLL 00152
Pro Se
150 Park Row
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- :

HARVEY JOHN POLL, :

Defendant. :

74 Cr. 808

75 Cr. 406

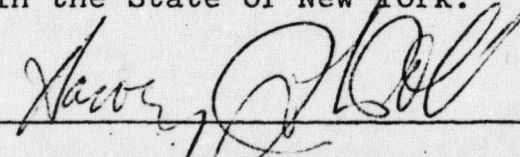
AFFIDAVIT OF SERVICE

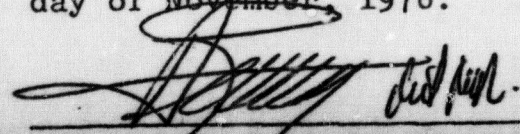
-----X
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARVEY JOHN POLL, being duly sworn, deposes and says:

That on the 12th day of November, 1976, your affiant served the within Notice of Motion, Affidavit, letter to the Court and Memorandum of Law upon U.S. Attorney ROBERT B. FISKE, at One St. Andrews Plaza, New York, New York, the address designated by said attorney for that purpose by depositing a true copy of same to said attorney enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 12th
day of November, 1976.


"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4064)".


METROPOLITAN CORRECTIONAL CENTER
150 PARK ROW
NEW YORK, NEW YORK 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-against- :

HARVEY JOHN POLL, :

Defendant. :
-----x

74 Cr. 808 (CHT)
75 Cr. 406 (CHT)

MEMORANDUM

APPEARANCES

For the Government: ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007
Of Counsel; ALAN R. NAFTALIS, A.U.S.A.

For the Defendant: HARVEY JOHN POLL, Pro Se

TENNEY, J.

Defendant pled guilty to a charge of conspiracy to possess and distribute some \$2,000,000 in counterfeit United States Treasury Bills, 18 U.S.C. § 371, and was convicted and sentenced to imprisonment for three years on August 12, 1975.

Defendant has moved, under 28 U.S.C. § 2255, to vacate the judgment of conviction and to dismiss the information to which he pled guilty. Alternatively, he moves for a reduction of sentence. The record conclusively demonstrates that defendant is entitled to neither relief.

Defendant claims that his guilty plea was involuntary

because it was induced by a plea-bargaining arrangement to which the Government has failed to adhere. However, the defendant did not inform this Court of any such arrangement upon being questioned as to the voluntary and intelligent nature of his plea of guilty. Transcript of Plea, April 21, 1975, at 4-8. Moreover, even if it is assumed that the plea was based upon a tacit arrangement, the terms of which are discussed more fully below, the ultimate accomplishment of those terms removes the ground on which the motion is based.

After defendant's conviction, he was subpoenaed to testify before a special grand jury in the Southern District of New York concerning the source of the counterfeit Treasury bills. When he refused to testify, even though granted use immunity pursuant to 18 U.S.C. § 6002, the Government moved to hold him in contempt before District Judge Brieant of this court. Judge Brieant found that while there had been no formal agreement between defense counsel and the Government, both defendant and his attorney believed that entrance of the guilty plea would eliminate any subsequent need for defendant to testify about the source of the counterfeit bills. Judge Brieant also found that while there was no "intentional wrongdoing or unprofessional conduct," Matter of Johnpoll, M11-188, at 7 (S.D.N.Y. July 16, 1976), the Government attorney had at all times intended to call defendant before the grand jury although he knew that defendant believed that the guilty plea would protect him from the grand jury inquiry. Term-

ing this misunderstanding a "misleading omission and unfair," id., Judge Brieant refused to hold defendant in contempt.

The Government concedes that Judge Brieant's order preserves the understanding behind defendant's consent to plead guilty--he believed that he was bargaining for protection from being compelled to reveal the source of the counterfeit bills or from being punished for refusing to do so. Since the defendant was not required to testify before the grand jury in this regard and therefore received in fact all that he expected from the agreement to plead guilty, his guilty plea must stand.

The Court has already considered and denied one motion for reduction of sentence brought by defendant, 75 Cr. 406 (S.D.N.Y. May 11, 1976), and at this time is without power to reconsider such a motion. For the foregoing reasons, the motions are denied.

So ordered.

Dated: New York, New York

June 10, 1977

CHARLES H. TENNEY

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

HARVEY JOHN POLL, :

Defendant. :
-----x

AFFIDAVIT

74 . 808

75 C.L. 406

*NOTICE OF
APPEAL*

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

Alan R. Naftalis, being duly sworn, deposes and says:

1. I am a Special Attorney, U. S. Department of Justice assigned to this office.
2. I have examined the papers filed by the defendant, HARVEY JOHN POLL, in this matter and submit this Affidavit in Opposition to the defendant's motion pursuant to Title 28, United States Code, Section 2255, Rule 57(b), Federal Rules of Criminal Procedure and Title 28, United States Code, Section 1651(a) and (b).
3. On April 21, 1975 this defendant pled guilty to an information charging him with violations of Title 18, United States Code, Section 371 for his part in a conspiracy to possess and distribute counterfeit United States Treasury Bills. The plea to this information (75 Cr. 406) was taken in lieu of a disposition on a pre-existing indictment, 74 Cr. 808, said indictment possessing more severe maximum criminal penalties. Subsequently, the indictment was dismissed on Government's motion.
4. The Honorable Charles L. Brieant, Jr., United States District Judge in a memorandum and order dated July 16, 1976 (hereinafter referred to as "memorandum") made certain findings of fact relating to the plea of guilty entered by the defendant. Judge Brieant noted in his memorandum:

Rosenberg [Johnpoll's attorney] concluded early that the factual elements of the case could not be defended successfully.... Rosenberg, who had been socially friendly with the defendant before his arrest, reached the conclusion that a disposition to a lesser charge would be in the interests of justice. [the original indictment charged offenses punishable with maximum sentences of ten years in Count I, and fifteen years in Count II] (see p. 5 of Judge Brieant's "memorandum").

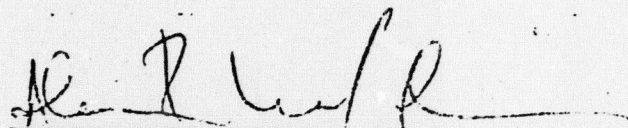
5. Subsequent to the defendant's guilty plea, the United States subpoenaed Johnpoll before a Special Grand Jury sitting in the Southern District of New York. Despite a grant of immunity by the Court, pursuant to Title 18, United States Code, Section 6002 Johnpoll refused to testify as to the source of his counterfeit treasury bills. As a consequence of this refusal the United States requested that HARVEY JOHN POLL be held in civil contempt.

6. Judge Brieant found that while Government counsel had "not engaged in any intentional wrongdoing or unprofessional conduct, but his failure to speak [concerning his intention to subpoena HARVEY JOHN POLL before the grand jury] was a misleading omission and unfair." (pages 6-7 of Judge Brieant's "memoranda"). Consequently the Court denied the Government's motion to hold HARVEY JOHN POLL in contempt.

7. Therefore, the defendant was not forced to testify before the grand jury nor imprisoned for his refusal to do so pursuant to the Court's contempt power. Simply stated, HARVEY JOHN POLL now stands in the position he has previously argued was his expectation at the time he pled guilty to violation of Title 18, United States Code, Section 371 (see page 10 of Judge Brieant's "memoranda"). The defendant has not contended that a plea was exacted by the Government to crime he did not commit. Furthermore, the defendant has not argued that the plea was the product of any threat or promise on the part of counsel or the Government, save only the defendant's belief that he would not be found to disclose the source of the counterfeit Treasury Bills and that his plea would "end" the matter. It is submitted that Judge Brieant's order protects the expectations of the defendant.

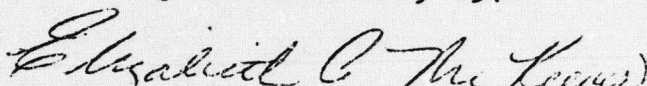
3.

8. WHEREFORE, it is submitted that the petition of HARVEY JOHNPOLL is frivolous and should be denied without a hearing.



ALAN R. NAFTALIS
Special Attorney
U. S. Department of Justice

Sworn to before me this
day of December, 1976


Notary Public

ELIZABETH A. McKEEVER
Notary Public, State of New York
No. 40-1629132
Qualified in Richmond County
Commission Expires March 30, 1978

NOTICE OF ENTRY

Sir: Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19 at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 77-1301

Year 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-v-

HARVEY JOHN POLL,

Defendant-Appellant

NOTICE OF MOTION AND
AFFIDAVIT IN SUPPORT

HARVEY JOHN POLL, Pro Se

~~Appellant~~ Appellant

Office and Post Office Address, Telephone

100 Ocean Parkway, Apt. 1N
Brooklyn, New York 11218
(212) 438-6627

To ROBERT B. FISKE, JR.

ALAN R. NAFTALIS, Of Counsel
Attorney(s) for Joint Strike Force
Appellee

Service of a copy of the within MOTION AND
AFFIDAVIT is hereby admitted.

Dated,

Attorney(s) for

